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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

S. MICHAEL KUNATH,
Plaintiff,
vs.
CITY OF SEATTLE,
Defendant.

No. 17-2-18848-4 SEA
ECONOMIC OPPORTUNITY
INSTITUTE'S MOTION TO INTERVENE

SUZIE BURKE, *et al.*,
Plaintiffs,
vs.
CITY OF SEATTLE, *et al.*,
Defendants.

DENA LEVINE, *et al.*,
Plaintiffs,
vs.
CITY OF SEATTLE,
Defendant.

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I. RELIEF REQUESTED

Economic Opportunity Institute (“EOI”) respectfully requests to intervene in the cases consolidated as Cause No. 17-2-21032-3 SEA, on defendant City of Seattle’s (the “City”) side, so it can raise and litigate, among other things, a constitutional challenge to RCW 36.65.030, which is relied upon by the plaintiffs in the consolidated actions. EOI’s intervention pleading seeks a declaration that RCW 36.65.030 is unconstitutional and void. EOI seeks intervention as of right, or alternatively permissive intervention, because the consolidated actions will necessarily decide the merits of EOI’s claims. EOI will comply with the case schedule established in the stipulated order entered by the Court on August 22, 2017 and therefore intervention will cause no delay.

II. STATEMENT OF FACTS

EOI is a Washington non-profit corporation headquartered in Seattle. Burbank Decl., ¶ 1. Its mission is to build an economy that works for everyone by advancing public policies that promote educational opportunity, good jobs, healthy families and workplaces, and a dignified retirement for all. *Id.*

Plaintiffs here argue that the City’s income tax ordinance, Ordinance 125339 (the “Ordinance”), is prohibited by RCW 36.65.030 which purports to prohibit cities, counties, and city-counties from levying a tax on net income. EOI’s intervention pleading seeks a declaration that RCW 36.65.030 is unconstitutional and void. Pursuant to RCW 7.24.110, EOI served notice on the Attorney General, along with a copy of this motion and EOI’s intervention pleading. Tonry Decl., ¶ 2. The City does not claim that it served comparable notice on the Attorney General. *See, e.g.,* City’s Answer to *Burke* Plaintiffs’ Amended Complaint.

1 EOI has a critical role to play in defending the Ordinance and proving the unconstitutionality
2 of RCW 36.65.030. Just as Plaintiffs represent members of the public in challenging the Ordinance,
3 EOI has been a primary public advocate supporting the Ordinance.

4 EOI was instrumental in the development and passage of the Ordinance. EOI is a founding
5 member of the Trump Proof Seattle coalition which City of Seattle Resolution 31747 recognizes as
6 an impetus for the City's income tax and a partner in developing the Ordinance called for by that
7 resolution. Burbank Decl., ¶ 2 - 3. EOI's staff, leaders, and activists, along with numerous other
8 members of Trump Proof Seattle coalition testified at every public comment opportunity concerning
9 the Ordinance and organized town halls in each City Council district to educate and advocate for a
10 Seattle income tax to meet local needs and address Seattle's regressive tax structure. *Id.*, ¶ 4. EOI's
11 Executive Director, John Burbank, gave a formal presentation to the City Council's Affordable
12 Housing, Neighborhoods, and Finance Committee to inform the Ordinance's development. *Id.* As
13 anticipated in Resolution 31747, EOI provided economic, policy, and legal expertise to the City
14 leading up to the Ordinance's passage. *Id.*, ¶ 5.

15
16 In its advocacy and technical support for the Ordinance, EOI drew on its experience as a
17 partner in the 2010 effort to enact a statewide income tax (Washington Initiative 1098) and in the
18 2016 effort to enact a local income tax in the City of Olympia. *Id.* EOI's leaders litigated the
19 Olympia measure's validity before the Court of Appeals in a pre-election review. Tonry Decl., ¶ 3.
20 That litigation involved much of the same issues raised in the cases at bar, as well as the
21 constitutional challenge to RCW 36.65.030. *Id.* The Freedom Foundation, which represents some of
22 the plaintiffs in this case, attempted to file an amicus brief in the Olympia litigation. *Id.*

23
24 In addition to having many leaders in Seattle who have advocated for Seattle's income tax
25 ordinance, EOI has leaders and activists in code cities that desire to enact local income tax

1 ordinances. Burbank Decl., ¶ 6. EOI’s advocacy in these other cities working on behalf of these
2 individuals entails substantial staff time and resources. *Id.* Elected officials and staff in these code
3 cities believe that their ability to enact an income tax depends upon the success of Seattle’s income
4 tax. *See id.*

5 III. STATEMENT OF ISSUES

6 Where an interested party intimately involved with the challenged ordinance seeks to
7 intervene prior to any substantive briefing deadlines, raises a claim and defense not asserted by the
8 existing defendants, and agrees to abide by the preexisting case scheduling order, should intervention
9 be granted?

10 IV. EVIDENCE RELIED UPON

11 This motion relies upon the declarations of John Burbank and Claire Tonry.

12 V. AUTHORITY & ARGUMENT

13 A. Legal Standard.

14 Civil Rule 24 provides for intervention as of right and permissive intervention, both of which
15 require a timely application. “[A] motion to intervene is timely if it is filed before the
16 commencement of the trial.” *Columbia Gorge v. Klickitat Cty.*, 98 Wn. App. 618, 623 (1999) (citing
17 *Amer. Discount Corp. v. Saratoga W., Inc.*, 81 Wn.2d 34, 43 (1972)).

18 Intervention as of right lies when (1) “a statute confers an unconditional right to intervene,”
19 or (2) “the applicant claims an interest relating to the property or transaction which is the subject of
20 the action and the person is so situated that the disposition of the action may as a practical matter
21 impair or impede the person’s ability to protect that interest, unless the applicant[’]s interest is
22 adequately represented by existing parties.” CR 24(a).
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1 “The requirements of CR 24(a) are liberally construed to favor intervention.” *Columbia*
2 *Gorge v. Klickitat Cty.*, 98 Wn. App. at 623. Consistent with that liberal construction, “the term
3 ‘interest’ is to be construed broadly, rather than narrowly,” *Vashon Island v. Boundary Review Bd.*,
4 127 Wn.2d 759, 765 (1995), and is not limited to direct monetary interests, or any other particular
5 type of interest, *Saratoga W.*, 81 Wn. 2d at 41-42 (quoting *Smuck v. Hobson*, 408 F.2d 175, 178-80
6 (D.C. Cir. 1969)).¹ Instead, it includes a “broad range of possible interests which elude satisfactory
7 classification under the terms of the rule.” *Saratoga W.*, 81 Wn. 2d. at 42. It is within the Court’s
8 discretion “in each instance to analyze and balance the relative concerns” of the applicant, the
9 existing parties in “controlling their own lawsuit, and of the public in the efficient resolution of
10 controversies” to determine whether the applicant’s interest supports intervention as of right. *Id.*

11 Permissive intervention is appropriate when a statute confers a conditional right to intervene
12 or the applicant’s claim or defense shares a common question of law or fact with the main action. CR
13 24(b).

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15 **B. EOI’s Motion is Timely**

16 EOI’s motion is timely because it is made not only well before trial or judgment, but very
17 soon after the cases were consolidated and well before any briefs are due. Responsive pleadings
18 were not even due in the two later-filed cases until August 29, 2017, at the earliest. In addition,
19 *Shock et al. v. City of Seattle*, King County Superior Court Case No. 17-2-22917-2-SEA, another
20 challenge to the Ordinance, was filed recently and has yet to be consolidated with this case.
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25 ¹ Washington Courts may look to federal intervention decisions for guidance. *Columbia Gorge Audubon Soc’y*, 98 Wn. App. at 623 n.2 (“Washington’s CR 24 is the same as the federal rule. Therefore, we may look to federal decisions and analysis for guidance.”).

1 **C. EOI Has a Right to Intervene Under Rule 24(a)**

- 2 1. RCW 7.24.110 provides for EOI’s intervention and disposition of this matter may
3 impair EOI’s ability to protect its interests.

4 RCW 7.24.110 provides that “[w]hen declaratory relief is sought, all persons shall be made
5 parties who have or claim any interest which would be affected by the declaration, and no declaration
6 shall prejudice the rights of persons not parties to the proceeding.” *See also Chem. Bank v. Wash.*
7 *Pub. Power Supply Sys.*, 102 Wn. 2d 874, 886 (1984) (RCW 7.24.110 confers an unconditional right
8 to intervene).

9 EOI has a substantial interest in this case both in an organizational and representational
10 capacity. *Loveless v. Yantis*, 82 Wn.2d 754, 757-59 (1973) (An organization whose members could
11 be aggrieved by the results of a judicial proceeding has sufficient interest in the subject of the action
12 to intervene on behalf of the members.) EOI has long been advocating for state and local income
13 taxes in Washington and has recently expended significant resources on efforts in Olympia, Seattle,
14 and other cities. *See Burbank Decl.*, ¶¶ 5-6. EOI’s interest and instrumental role in the Ordinance is
15 a matter of public record. *Id.*, ¶¶ 3-4.

16 EOI has made these efforts because fixing the regressive tax system in Seattle and elsewhere
17 and establishing a progressive funding source for urgent local needs are highly important to EOI’s
18 leaders and activists and its mission. *Id.*, ¶ 7. These individuals include EOI’s Board President, a
19 small business owner whose staff members have been forced out of Seattle by the lack of affordable
20 housing – a need that the Ordinance is expected to fund *Id.*, ¶ 7. They also include parents, teachers,
21 and working families who are currently harmed by Seattle’s regressive tax structure and who stand to
22 benefit from the Ordinance’s funding for education programs such as Seattle’s Preschool Program
23 and community college tuition support. *Id.*

1 EOI also has claims that could be affected by the declaratory judgment Plaintiffs seek in the
2 main actions. Specifically, EOI seeks a declaration that RCW 36.65.030 is unconstitutional and void
3 and that the Ordinance is valid.

4 2. The City does not adequately represent EOI's interests.

5 Like the "interest test," the lack of adequate representation requirement is broadly interpreted
6 and requires only that applicants make "a minimal showing that its interests may not be adequately
7 represented." *Columbia Gorge Audubon Soc'y*, 98 Wn. App. at 630. The questions are whether the
8 existing party will undoubtedly make all the proposed-intervenor's arguments, and whether the
9 proposed-intervenor will more effectively articulate any aspect of its interest. *Id.* "When in doubt,
10 intervention should be granted." *Id.*

11 Washington courts frequently find that state or local government entities do not adequately
12 represent individuals or organizations, even where their ultimate goals are aligned. *Pub. Util. Dist.*
13 *No. 1 of Okanogan Cty. v. State*, 182 Wn. 2d 519, 532-33 (2015) (collecting cases finding that
14 governmental units did not adequately represent the interests of their residents despite their ultimate
15 interests being aligned); *Vashon Island*, 127 Wn.2d at 765 (intervention despite arguably adequate
16 representation by Review Board). That is true here for multiple reasons.

17 First, EOI has a distinct interest in ensuring that the Ordinance is upheld on grounds that are
18 not specific to first class or charter cities, as EOI advocates for adoption of local income taxes in
19 code cities as well as in Seattle. Burbank Decl., ¶¶ 5-6.

20 Second, because EOI advocates for local income taxes in less populous code cities, it also has
21 a distinct interest in the Court upholding provisions of the Ordinance that allow code cities to accrete
22 to Seattle's anticipated data sharing agreement with the IRS. *Id.* Cities of less than 250,000 residents
23 may access IRS data for their city only by partnering with other cities that have local income taxes
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1 and which have a combined population of 250,000 or more. 26 U.S.C. § 6103. The Ordinance has a
2 provision for Seattle to facilitate such data sharing. SMC 5.65.200; 5.65.230(C)(7). EOI has a
3 stronger interest in protecting that provision of the Ordinance than does Seattle, since it benefits
4 EOI's work in smaller cities.

5 Third, EOI's pleading alleges that RCW 36.65.030 is unconstitutional and void, thereby
6 providing an alternative ground for rejecting Plaintiffs' arguments that the statute precludes the
7 Ordinance. The City has not thus far made a counterclaim that RCW 36.65.030 is unconstitutional
8 nor provided notice to the Attorney General of its intent to do so.

9 For all of these reasons, the City does not adequately represent EOI's interests.

10 3. EOI's intervention will serve the public interest in efficiency.

11 Granting EOI's motion for intervention and integrating EOI's claims and defenses into the
12 existing expedited case schedule will be more efficient than EOI filing a separate cause, which would
13 likely be consolidated with the instant consolidated cases at some later point.

14 **D. The Court Should Permit EOI to Intervene Under Rule 24(b)**

15 1. EOI's claims share common questions with the main actions.

16 EOI's claims for a declaration that the Ordinance is valid and that RCW 36.65.030 is
17 inapplicable and/or void and therefore not a basis for invalidating the Ordinance share common
18 questions with the main actions, in which Plaintiffs seek a declaration that the Ordinance is invalid
19 and assert RCW 36.65.030 as a basis for invalidating the Ordinance.

20 2. EOI's intervention will not result in undue delay or prejudice.

21 Rule 24(b)(2) provides that "the court shall consider whether the intervention will unduly
22 delay or prejudice the adjudication of the rights of the original parties." EOI's intervention will not
23 result in any prejudice or delay, as EOI is serving its complaint in intervention in the very early
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stages of the main actions and EOI will comply with the recently established briefing schedule agreed to by the parties.

VI. CONCLUSION

For the foregoing reasons, EOI respectfully requests that the Court grant EOI's motion to intervene in the consolidated cases challenging the Ordinance.

RESPECTFULLY SUBMITTED this 6th day of September, 2017.

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The above-signed attorney certifies that this memorandum contains 2,111 words, in compliance with the Local Civil Rules.